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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1084

NATIONAL GYPSUM COMPANY and
PLAZA PLASTERING COMPANY,
Petitioners,

v.

UNITED STATES GYPSUM COMPANY,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The questions presented by petitioners are hypothetical and irrelevant to the facts and issues in the case.

Petitioners' first two questions ask the Court to determine legal questions which presume the existence of a "tie-in" or "tying arrangement" by which respondent refused to grant licenses under its patent except on the condition that the licensee purchase respondent's spark-perforated tape for use in practicing the invention. But, the patent licenses of respondent did not involve a tie-in or tying arrangement. Both the District Court and the Court of Appeals refused to make such a finding although such a finding was sought by petitioners. The Court of Appeals said that "success on defendants' [petitioners'] claim of misuse would require *at least* a finding that plaintiff restricts licensing for the purpose of compelling the use of its

own tape" (P. App. 7*) (emphasis added). Therefore, the first two questions are purely hypothetical.

Petitioners' third and fourth questions assume that the patent involved in this suit is within the scope of the antitrust decree** because, if it is not, the questions are purely hypothetical. Petitioners argued that the patent is within the scope of the decree to both the District Court and the Court of Appeals, but both courts refused to make such a finding. On this point, the District Court said:

> "Since the Decree specifically limits itself to patents relating to wallboard made from gypsum, it would appear that it was not the intention of the Court to include under the Decree those patents which related to wallboard which was not necessarily made from gypsum." (P. App. 34)

The Court of Appeals found it unnecessary to reach this issue.

STATUTES INVOLVED

In addition to the statutes cited by petitioners, reference is also made to Section 1 of the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §12 (1964), which provides in pertinent part:

> "'Antitrust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July

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* As used herein, "P. App." means Appendix to Petition; "Pet." means the Petition for Writ of Certiorari; "Supp. App." means Supplemental Appendix to Brief for Plaintiff-Appellant (filed in the Court of Appeals by respondent); "P. A. App." means Appendix to Brief for Plaintiff-Appellant (filed in the Court of Appeals by respondent); and "D. App." means Appendix to Brief for Defendants Appellees (filed in the Court of Appeals by petitioners).

** Decree entered on May 15, 1951 in *United States* v. *United States Gypsum Co., National Gypsum Co., et al.* Civil Action No. 8017, District of Columbia District Court (herein referred to as the *Gypsum* case). P. App. 51-68.

second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes,"' approved February twelfth, nineteen hundred and thirteen; and also this Act."

STATEMENT OF THE CASE

Petitioners' statement of the case is inadequate to give this Court the background necessary to determine whether or not to grant the writ. When this background is fully understood, it will be apparent that there is no important question of federal law which should be settled and that the decisions of the courts below are not in conflict with applicable decisions of this Court. Petitioners do not claim any conflict with the decision of any other Court of Appeals.

Petitioner National Gypsum Company (National) and respondent United States Gypsum Company have been competitors for many years in the manufacture and sale of wallboard which is used to form walls and ceilings by fastening it to wood or metal studs. A principal problem in the wallboard industry has been the need to discover a better way to cover the joints between two adjoining pieces of wallboard to form a smooth surface which can be painted, wallpapered or otherwise treated for decorating purposes.

On June 5, 1956, respondent obtained a patent on a new combination or method of covering the joints between wallboards which contained five claims, of which claims 1 and 5 are representative:

"1. The combination with wallboards attached to a support and having edges in substantially abutting

relationship forming a wallboard joint, of a strong thin cellulosic strip having perforations throughout with diameters from about 0.02 inch to 0.002 inch, said strip being adhesively secured over said joint and the edges of said wallboards adjacent thereto.

"5. The method of covering the joint between adjacent wallboards which comprises adhesively securing over said joint a strip of strong paper provided with substantially uniformly arranged spark-produced perforations having diameters from about 0.02 inch to 0.002 inch to permit the escape of air entrapped beneath said strip while substantially preventing the escape therethrough of adhesive employed to secure the strip in place." (P. App. 3)

Although the strip or tape is not patented *per se,* it is clearly a material part and, in fact, the most important element of the patented combination and method, being a tape specifically described in detail in the patent as a spark-perforated tape, the perforations having particular diameters which permit the escape of air trapped beneath the tape while preventing the escape of adhesive. Tape of this kind and description has no substantial commercial use other than as an element in practicing the invention.*

The value of the patent is in the improved method of treating wallboard joints so that the joints are hidden and, after decorating, the wall partition has a smooth surface comparable to wall partitions of lath and plaster. The invention is one that is practiced primarily by contractors and applicators erecting wall partitions in buildings and there are literally thousands of such contractors and applicators in the United States. It is not an invention

* The District Court refused to find that this spark-perforated tape had any substantial noninfringing uses. The Court of Appeals said: "We conclude that if the patent was valid, it was infringed." (P. App. 5). Petitioners (Pet. 10-11) concede that they "do not complain" that "the selling of such tape by others constitutes contributory infringement." See 35 U.S.C. § 271(c) (1964).

that would normally be practiced by the respondent or the petitioner National, neither of whom is in the business of erecting wall partitions but are in the business of manufacturing wallboard and tape for covering the wallboard joints. The value of the invention to respondent is in having it used by contractors and applicators to improve the acceptance of drywall construction.

Respondent never refused to grant a license under the patent to anyone who desired to construct wallboard joints using the combination or method described in the patent or who manufactured or sold tape of the kind described in the patent. On the contrary, respondent took various steps to make the invention freely available to manufacturers, contractors and applicators.

As a manufacturer of the particular kind of tape described in the patent, it sold it with the inscription

> "Licensed for use in wallboard construction covered by Patent #2,749,267." (Supp. App. 959).

In so doing, respondent was merely notifying the ultimate user of the tape (the contractor or applicator) of a license which it had by implication through the purchase of the tape. *United States* v. *Univis Lens Co.*, 316 U.S. 241, 249 (1942).

Respondent licensed Marvan Corporation, a Connecticut corporation, and Evon Industries, Incorporated, a New York corporation—who were manufacturers of tape, to use the invention and to sell for use in the invention the special spark-perforated tape, whether the tape was manufactured by the licensee or by others for the licensee. The license agreements provide:

> "1. Licensor hereby grants to Licensee upon the terms and the conditions hereinafter set forth an indivisible, nonexclusive license and privilege under said

patent No. 2,749,267, and any reissues or extensions thereof, *to manufacture, use and sell the invention covered by said patent, and to sell for use in said invention, wallboard joint tape known by Licensee to be especially made or especially adapted for use in said invention, whether such tape be manufactured by Licensee or by others for Licensee.* Licensor further grants to Licensee the right to sub-license purchasers of wallboard joint tape sold by Licensee under the foregoing license to use the same in practicing the invention covered by said patent by affixing to such tape a notice as provided in paragraph 4 hereof." (Emphasis added.) (P. App. 70)

The license did not require a purchase of tape from respondent, nor was it limited to tape manufactured by the licensee, but clearly provided that, to the extent licenses were granted, the spark-perforated tape could be manufactured by the licensee or by others (including National) for the licensee. In short, respondent gave these licensees every right to use the invention which respondent had under the patent. The license provided for a royalty only on the special spark-perforated joint tape *used or sold for use in the invention.*

Respondent offered National a license "on the same terms as licenses which have already been granted to others," but National refused to take a license (Supp. App. 839) and continued to manufacture the special spark-perforated tape and sell it to others (including manufacturers of wallboards) giving them indemnities against infringement. (P.A. App. 441-46)

National having continued to manufacture spark-perforated tape of the type described in the patent, which could only be used in the practice of the invention, respondent commenced suit in the Northern District of Illinois against National for contributory infringement and inducement of infringement, and against Plaza Plastering Company, an applicator who bought spark-perforated tape

from National and used it in the construction described in the patent, for direct infringement.

The answers denied liability on the grounds that the patent was invalid, that, if valid, it was not infringed, and that the patent had been misused. The answers also contained counterclaims alleging violation of Section 2 of the Sherman Act by monopolization or attempted monopolization of the sale of spark-perforated tape. The counterclaims were later amended to include an allegation that respondent conspired with its licensees to obtain a monopoly of the sale of spark-perforated tape. At the trial, after the close of petitioners' case, the trial judge granted respondent's motion to dismiss the counterclaims, pointing out that the petitioners' evidence had failed to show a violation of the Sherman Act. At the conclusion of the trial, the court found the patent valid but not infringed and rejected the misuse claims.

The Court of Appeals remanded on certain aspects of the question of validity, saying that further findings should be made. The court also held that if the patent was valid, it had been infringed by National and Plaza Plastering Company and affirmed the lower court's decision that there had been no misuse or antitrust violation. A petition for rehearing on one phase of the issue of validity was denied November 7, 1967. There was no petition for rehearing on the issue of infringement or the so-called antitrust and misuse issues. Significantly, petitioners are not challenging the Court of Appeals' holding that they have infringed the patent.

REASONS FOR DENYING THE WRIT

Introduction

Petitioners' reasons for asking the Court to grant certiorari are misleading and illogical.

Petitioners' first two questions assume that respondent has refused to license others to use the patent except on the

condition that the licensee purchase respondent's tape, and then ask the question whether or not such a tie-in is a misuse of the patent and a violation of Section 1 of the Sherman Act. But, there is no finding that there was any such tie-in condition. In fact, the District Court refused to make any such finding and the Court of Appeals affirmed. In effect then, the Court is asked to review the record and find that there was a tie-in arrangement and *then* decide the questions which petitioners have presented.

Petitioners' third and fourth questions deal with an antitrust decree entered against respondent, National, and others in 1951. They springboard their questions on an assumption that this patent is covered by the decree in spite of the fact that the District Court refused to make any such finding and the Court of Appeals affirmed. And, in the fourth question, petitioners further assume that the decree has been violated and then ask the Court to hold that any violation of an antitrust decree is a *per se* violation of the antitrust laws.

Briefly stated, the questions which petitioners would have this Court decide are dependent upon a review of the record and the making of findings of fact which the District Court refused to make, which refusal was upheld by the Court of Appeals.

Respondent submits that this controversy does not raise any important questions of federal law and that there is no conflict with applicable decisions of this Court. This is a private scrap between two manufacturers of wallboard and tape relating to issues of patent validity and infringement. The so-called antitrust and misuse issues are without substance and are purely hypothetical.

Significantly, petitioners proved no damage to anyone and admitted in open court that they did not expect to be able to prove any damanges to their business or property as a result of the claimed misuse and antitrust violation.

The sole reason for pursuing the antitrust feature of the case, as admitted by petitioners' counsel was to enable petitioners to collect treble attorneys' fees (D. App. 208-9).

1. Petitioners' First Question

Petitioners' first question asks whether or not it is a misuse of a patent to tie to the licensing of the patent the sale of an unpatented product.

Petitioners argue (Pet. 8-11) that the Court should grant certiorari because "this Court has not heard a case involving patent tie-in arrangements since the enactment of the Patent Act of 1952 . . ." and that there is some difference of opinion regarding the effect of Section 271 on the doctrine of *Mercoid*.* Petitioners' argument is that respondent's patent licenses are condemned by *Mercoid* and, therefore, it is important to determine to what extent Section 271 affected the holding in *Mercoid*.

But the fallacy of the argument is that the tie-in condition condemned by *Mercoid* is not present in this case and we do not even reach the question whether, and to what extent, Section 271 affected the holding in *Mercoid*.

In *Mercoid* the exclusive licensee under the patent refused to grant sublicenses to use a combination patent, except on condition that the sublicensees purchase the unpatented stoker switch, which was an element of the combination, from the exclusive licensee. It was held this tie-in was an extension of the patent monopoly which constituted a misuse of the patent and a violation of Section 1 of the Sherman Act.**

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* *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U.S. 661 (1944).

** Unlike the case at bar, the evidence in *Mercoid* clearly showed a tie-in. This Court there said (320 U.S. at 663): "Minneapolis-Honeywell in advertising its [unpatented] stoker switches stated that the 'right to use' the Cross system was 'only granted to the user' when the stoker switches of Minneapolis-Honeywell were purchased from it and used in the system."

But, respondent did not enter into any such tie-in condition and, consequently, it is immaterial to a decision in this case to what extent Section 271 of the Patent Act of 1952 changed or affected the decision in *Mercoid*. The District Court found from the record there was no evidence of any such tie-in condition as was condemned in *Mercoid* and the Court of Appeals affirmed. Thus, it would take a new review of the record and a finding by this Court that there was a tie-in condition before the question posed by the petitioners is even arguable.

Respondent never granted any license on the condition that the spark-perforated tape specifically described in the patent should be purchased from respondent. And, it never refused to grant a license to anyone because the prospective licensee refused to purchase tape from the respondent. The evidence is that it never refused a license to anyone. Petitioners point to no evidence or any finding to the contrary and they cannot do so.

Petitioners' argument (Pet. 11) that there is an illegal tie-in condition is that the granting of licenses by placing a notice on the special spark-perforated tape, requires the user (contractor or applicator) to pay a built in but unknown royalty no matter what he chooses to do with the tape and that he gets no refund if the tape is destroyed or shipped from the country. Petitioners then conclude: "It is this tying arrangement that constitutes an unlawful extension of the monopoly, i.e., a misuse."

This statement of petitioners' position completely fails to establish any tie-in condition of a nature condemned in *Mercoid* or any other tie-in case. It does not support the conclusion that respondent refused to grant licenses except on the condition that the licensee purchase *respondent's* spark-perforated tape. Even the petitioners' premises

are unsupported. There is no finding, and no evidence from which a finding could be made, that any purchaser of special spark-perforated tape has to pay a royalty to anyone. And the premise that a purchaser of special spark-perforated tape buys it for any use other than to use it in treating of wallboard joints, is without any support—the spark-perforated tape of the kind called for by the patent is specially made for that purpose and there is no finding that there is any other use for the tape.

Petitioners do not claim that the sale of special spark-perforated tape by respondent was itself a tie-in condemned by *Mercoid*. In fact, petitioners admit (Pet. 10-11) they cannot complain that respondent sells spark-perforated tape. Consequently, the sale of tape together with a license to use it in the invention is not a tie-in such as condemned by *Mercoid*.

Furthermore, it is clear from the record that respondent had no intention or program of seeking a monopoly in the sale of special spark-perforated tape. It licensed two manufacturers to make, use and sell the invention and to sell special spark-perforated tape for use in the invention and provided that the licensee could manufacture the tape or have it manufactured for him. And petitioner National was also offered a license on the same terms. This is positive evidence that there was no attempt here to monopolize the manufacture and sale of special spark-perforated tape or to limit the practice of the invention to special spark-perforated tape manufactured by respondent or its licensees.

And there is no anticompetitive purpose or effect in respondent's activities. There is no evidence or claim of any "injury" to anybody's trade or business as a result of respondent's licensing practices. Daniel Plaza, the President of petitioner, Plaza Plastering Company, testified that

until this lawsuit was initiated, he "never knew there was such a thing" as spark-perforated tape, and that he had used numerous companies' tapes, including respondent's, but that he recognized no difference between different brands of tape and never once specified a tape by brand (P.A. App. 148-53). George H. Wilbur, a dealer in wallboard, joint cement and joint tape manufactured by respondent, by National, and by others, testified that he was not familiar with the patent in suit and that he had never heard of any patent relating to spark-perforated wallboard joint tape (Supp. App. 143-44). The only other dealer who testified on this subject testified to the same effect (Supp. App. 146-48).

Thus, we do not even reach *Mercoid,* because there was no tie-in condition such as was condemned in *Mercoid* and it becomes unimportant to determine to what extent, if any, the doctrine of *Mercoid* was affected by Section 271 of the Patent Act of 1952.

2. Petitioners' Second Question

Petitioners' second question is: Where a patentee has tied to a patent license the purchase of an unpatented product which can be used in a patented combination, is it necessary to establish relevant market characteristics to establish a violation of Section 1 of the Sherman Act?

Petitioners (Pet. 12) claim that there is an illegal tying arrangement under Section 1 of the Sherman Act on the same grounds that they claim an illegal tie-in condition under the doctrine of *Mercoid,* i.e., that users of the special spark-perforated tape are compelled to pay an unknown built in royalty and get no refund if the tape is used for some other purpose or shipped out of the country. We disposed of that argument under *Mercoid* at pp. 9-11 of this brief. The argument is no more valid in sustaining an

illegal tie-in condition under Section 1 of the Sherman Act for the same reasons.

Then, petitioners say that respondent has denied "competitors free access to the market for spark-perforated tape, the tied product"—not because of a better product or lower price but by leverage. But petitioners do not say what respondent has done to warrant this statement. Respondent did not grant any license on condition that the licensee purchase respondent's spark-perforated tape. It did not refuse any license because the prospective licensee would not agree to buy respondent's spark-perforated tape. It never refused a license to anyone. Petitioners completely fail to point to any practice of respondent that is condemned by the cases they refer to under this point. On the other hand, petitioners concede that any sale of special spark-perforated tape for unlicensed use in the invention constitutes contributory infringement (Pet. 10-11). But this results from the patent grant, not because of any unlawful leverage exercised by respondent. In fact, petitioners have been found guilty of infringement by the Court of Appeals and they do not challenge that ruling.

Petitioners argue that the District Court in its opinion commented that there was no evidence of plaintiff's position in the relevant market, whether the market included all kinds or types of tape or only spark-perforated tape. Obviously, at that point the District Court was not talking about any alleged "tie-in" or Section 1 violation, but rather about petitioner's claim of monopolization and attempted monopolization under Section 2 of the Sherman Act. There is no holding here that establishment of a relevant market is necessary to prove an illegal patent tying arrangement under Section 1. Furthermore, as it relates to Section 2, the District Court's statement is in accord with the decision

of this Court in *Walker Process Equipment Inc.* v. *Food Machinery & Chem. Corp.*, 382 U.S. 172, 177 (1965).

The cases cited by petitioner as supposed authority for the contentions made relating to their second question are clearly cases where the sale, lease or license was conditioned on the purchase from the grantor of some other product or service. In *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958), leases and sales of property were conditioned on the lessee or the buyer shipping their products over the lines of the Northern Pacific. In *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), a lease of a patented dispensing machine was made only on condition that the lessee purchase its salt tablets from International Salt. In *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), the licensing of certain motion pictures was on the condition that the licensee take certain other pictures. The same was true in *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962).

The doctrine of these cases is clear, but we do not have any such tie-in condition here.

3. Petitioners' Third Question

Petitioners' third question asks the Court to hold that both the District Court and the Court of Appeals were wrong in deciding that the respondent's licensing practices did not violate the 1951 *Gypsum* decree entered in antitrust litigation involving respondent's licenses under its gypsum board patents. (P. App. 51-63)

None of the considerations applied by this Court in determining whether or not to exercise its certiorari jurisdiction is present in petitioners' third question. What is involved is simply the interpretation of the language of a District Court decree. Both lower courts held that respondent's

licenses did not violate the decree and thus there is no need for further review.

Furthermore, it is amply clear that the decisions of both lower courts correctly interpret the antitrust decree. That decree directed respondent to grant licenses on all patents issued, applied for or acquired within five years after the date of the decree "relating to gypsum board, its processes, methods of manufacture or use." Respondent was permitted to charge a reasonable non-discriminatory royalty "which royalty may not be imposed upon or measured by patent-free products, processes or uses . . ." The District Court and the Court of Appeals determined that spark-perforated tape of the kind described in the patent, although not patented *per se,* was not "patent-free" as that term was used in the decree.

Obviously, the use of the term "patent-free" has a meaning different from "unpatented", else the more familiar term "unpatented" would have been used. How could it be argued with any sincerity that spark-perforated tape of the kind specifically set forth in the patent is "patent-free" when the sale of that tape by National has been held by the Court of Appeals to be an infringement of respondent's patent, from which holding petitioners have not appealed.

The term "patent-free" has already been construed as meaning something other than "unpatented." An interim license attached to the decree and approved by the court when the decree was entered provided that the licensee shall pay royalties "at the rate of a fixed percentage of licensee's selling price on all gypsum board manufactured by a patented process or embodying any of the inventions covered by said patents and sold by it during the term of the license." (DX 1257, D. App. 537). A gypsum board

"embodying" any of the inventions of the licensed patents would be a patented product. A gypsum board which was merely manufactured under any of the licensed processes could be an unpatented product. If "patent-free" simply meant "unpatented," the approval of this interim license was itself a violation of the decree.*

Petitioners falsely attempt to imply that this Court placed a different construction on the words "patent-free" (Pet. 18-19). The language quoted from this Court's opinion in the *Gypsum* case (333 U.S. at 400) was obviously directed at this Court's disapproval of the basing of royalties on the sale of a product (open-edge gypsum board) which was neither patented nor produced by or used in connection with a patent. The opinion is therefore completely in accord with that of the District Court that entered the antitrust decree as well as the District Court and Court of Appeals in this case. Contrary to petitioners' representation (Pet. 18), none of the cases from this Court's *Gypsum* opinion involved the question of basing royalties on products made by a patented machine or process, or used in a patented combination or method.

Furthermore, it is equally apparent that the patent is not covered by the *Gypsum* decree, which was limited to *gypsum* board, its processes, methods of manufacture or use. This was recognized by the District Court which said:

> "Since the Decree specifically limits itself to patents relating to wallboard made from gypsum, it would

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* Petitioners' statement that "there is no indication that the interim license was considered or discussed by the Court" (Pet. 20) is false. On the day of the entry of the decree, the interim license was discussed at length (DX 2000, pp. 598-99) and the Court concluded "We approve the form of the license agreement and order it filed . . . The court has executed the decree, and with the attached license agreement, which has the approval of the court . . ." (DX 2000, pp. 601-02).

appear that it was not the intention of the Court to include under the Decree those patents which related to wallboard which was not necessarily made from gypsum." (P. App. 34).

We suggest that the third question posed by petitioners is not a question of federal law to be settled by this Court and, certainly, the decision below is not in conflict with applicable decisions of this Court.

4. Petitioners' Fourth Question

Petitioners' fourth question seeks to have this Court rule that a violation of an antitrust decree is a *per se* violation of the antitrust laws. This question will be reached only if this Court overturns both the lower courts' interpretation of the words "patent-free" as used in the 1951 antitrust decree and also finds that the patent is subject to the decree. Obviously, this is not a proper question for certiorari because the decision of both lower courts is fully in accord with the prior decisions of this Court.

Petitioners' antitrust claims are based upon Section 4 of the Clayton Act (15 U.S.C. §15), which provides for treble damage suits for violation of the "antitrust laws." Section 1 of the Act (15 U.S.C. §12) defines "antitrust laws" as consisting of the Sherman Act, the Clayton Act, and the Wilson Tariff Act. This Court has held that "the definition contained in Section 1 of the Clayton Act is exclusive." *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 376 (1958). Therefore, even if petitioners could show a violation of the antitrust decree, this would not be a *per se* violation of the antitrust laws, because the decree is not one of the "antitrust laws," as defined by this Court.

Antitrust decrees enjoining activity otherwise completely lawful under the antitrust laws have frequently been ap-

proved by this Court. "To ensure . . . that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." *United States* v. *Loew's Inc.*, 371 U.S. 38, 53 (1962); ". . . [T]he court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices", *FTC* v. *National Lead Co.*, 352 U.S. 419, 430 (1957); "The decree enjoins continuation or repetition of the conduct found illegal . . . It also contains certain other restraining provisions which were within the Court's discretion because 'relief, to be effective, must go beyond the narrow limits of the proven violation' *United States* v. *United States Gypsum Company*, 340 U.S. 76, 90 (1950)," *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 600 (1951); ". . . Equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy," *United States* v. *Paramount Pictures Inc.*, 334 U.S. 131, 148 (1948).

Furthermore, in *United States Gypsum Company* v. *National Gypsum Company*, 352 U.S. 457 (1957), this Court rejected a similar claim by National [which is reiterated in the petition herein (Pet. 20)] that a violation of the decree constituted a misuse which barred recovery for infringement (352 U.S. 457, 466-8). That decision, which arose in prior litigation between respondent and National involving the same decree, establishes that a violation of the decree is not, *per se*, a bar to an infringement action and, *a fortiori*, not a violation of the antitrust laws.

Conclusion

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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